A

NAZRI SAHAK

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
HASAN LAH JCA
KANG HWEE GEE JCA
[CRIMINAL APPEAL NO: W-05-124-2006]

C

24 AUGUST 2009

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drugs - Possession proved on direct evidence without resort to statutory presumption - Presumption of trafficking drawn*

D

upon the affirmative finding of possession - Whether trial judge obliged to invoke statutory presumption of possession when direct evidence of possession in existence - Whether trial empowered to draw presumption of trafficking in lieu of direct evidence of the same - Whether approach of trial judge proper - Dangerous Drugs Act 1952, ss. 37(d), (da)(vi), 39B(1)(a)

E

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drugs - Possession, proof of - Accused caught red-handed with drugs - Conduct of accused at the moment of arrest*

F

indicated that accused had knowledge concerning the drugs - Whether possession constituted passive possession

CRIMINAL PROCEDURE: *Mens rea - Deduced from conduct - Dangerous drugs, trafficking in - Accused's frightened appearance, attempting to flee and dropping of bag containing drugs, evidence of -*

G

Proper inference to be drawn from such conduct - Whether evidence of such conduct admissible under s. 8 of the Evidence Act 1950 - Whether evidence of such conduct indicated that accused had knowledge concerning the drugs - Whether such conduct evidence of a guilty mind - Evidence Act 1950, s. 8

H

EVIDENCE: *Circumstantial evidence - Conduct - Accused's frightened appearance, attempting to flee and dropping of bag containing drugs, evidence of - Proper inference to be drawn from such conduct - Whether evidence of such conduct admissible under s. 8 of the Evidence Act 1950*

I

- Whether such conduct evidence of a guilty mind - Evidence Act 1950, s. 8

EVIDENCE: *Presumption - Drawing of - Whether trial judge obliged to invoke statutory presumption when direct evidence concerning a fact to be proved in existence - Whether trial judge empowered to draw statutory presumption in lieu of direct evidence concerning a fact to be proved*

The appellant was convicted in the High Court of trafficking in dangerous drugs contrary to s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') and sentenced to death. He appealed to the Court of Appeal against conviction and sentence. The facts indicated *inter alia*, that the appellant was observed by the police raiding party emerging from a block of flats carrying a plastic bag. At the moment of arrest, the appellant appeared frightened, attempted to flee whilst simultaneously dropping the plastic bag later found to contain the drugs. In the Court of Appeal, counsel argued *inter alia* the following: (i) that the trial judge ought to have invoked the presumption of possession rather than the presumption of trafficking as the judge did; and (ii) the possession of the drugs, if at all was merely passive possession.

Held (dismissing the appeal)
Per Suriyadi Halim Omar JCA delivering the judgment of the court:

(1) It was obvious that there was no other conclusion the trial judge could arrive at except that the appellant had custody and control of the drugs. The appellant clearly had the power of disposal over the drugs from the time he emerged from the flats right up to the moment before he was pounced upon by the police. The appellant's frightened appearance, his attempting to flee and the dropping of the plastic bag constituted conduct admissible under s. 8 of the Evidence Act 1950 and had a bearing on the facts in issue. The inference to be drawn from such conduct was that the appellant knew what he was carrying. Such conduct indicated a guilty mind in that the appellant had knowledge of the drugs. *PP v. Mohd Radzi Abu Bakar* (refd); *PP v. Reza Mohd Shah Ahmad Shah* (refd); *Abdullah Zawawi bin Yusof v. PP* (refd); *Parlan Dadeh v. PP* (refd). (para 9)

(2) In the instant case, the elements of physical control as well as knowledge had been scrupulously proved. The finding of the trial judge was based on direct evidence. There was no necessity for him to invoke any statutory presumption to arrive at such an obvious conclusion. Any attempt to avoid alluding

A to the direct evidence would not assist the prosecution, when wishing to invoke any presumption later. *PP v. Mohd Radzi Abu Bakar* (refd). (para 10)

(3) The trial judge had refused to consider direct evidence relating B to the element of trafficking and had instead invoked the presumption of trafficking under s. 37(da)(vi) of the DDA. There was nothing wrong in his course of action. The judge did not err in finding that the prosecution had established a *prima facie* case of trafficking. At the close of the defence's C case, the trial judge had correctly concluded that the appellant had failed to rebut the presumption of trafficking and the prosecution's case on a balance of probabilities. He did not err in deciding that the prosecution's case had been established beyond reasonable doubt. (paras 11 & 12)

D **(4)** The question of choosing one presumption over the other did not arise in the instant case. The trial judge had sufficient direct evidence to decide affirmatively that the ingredient of possession had been established without the need to invoke E s. 37(d) of the DDA. This affirmative finding was consistent with the view of the Federal Court in *Muhammed Hassan v. PP* that there be an express affirmative finding of possession, as opposed to a legal presumption, before invoking the presumption of trafficking. Further, there appears to be no law F in existence directing a judge to choose one statutory presumption in preference over another, let alone force him to invoke a statutory presumption when direct evidence is in abundance. (paras 17 & 18)

(5) In the instant case, the ingredient of 'buying' which fell within G the meaning of trafficking could easily have been established by direct evidence, thus establishing more than passive possession. The direct evidence of buying could be gauged from the admissions of the appellant and the relevant contents of his cautioned statement, coupled with the expensive drugs H having being found on him. Since the appellant was caught red-handed with a large amount of drugs, exacerbated by his countenance and conduct, he was involved with something more than passive possession. Indeed he was trafficking as per the charge. On the totality of the evidence adduced, the I prosecution had proven beyond reasonable doubt the offence of trafficking. *PP v. Haling Arala Jimjani* (dist). (paras 22, 23, 24 & 25)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah disabit oleh Mahkamah Tinggi atas kesalahan mengedar dadah berbahaya di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') dan telah dijatuhkan hukuman mati. Perayu merayu ke Mahkamah Rayuan terhadap sabitan dan hukumannya. Fakta antara lain menunjukkan bahawa perayu dilihat oleh pasukan penyerbu polis keluar dari sebuah blok flat dengan membawa satu beg plastik. Semasa ditangkap perayu nampak ketakutan, dan ketika cuba melarikan diri telah menjatuhkan beg plastik yang mengandungi dadah berkenaan. Di Mahkamah Rayuan, peguambela antara lain mengemukakan hujah-hujah berikut: (i) bahawa hakim bicara sepatutnya menggunapakai anggapan milikan dan bukannya anggapan mengedar seperti yang dilakukan beliau; (ii) milikan dadah, jikapun wujud, hanyalah merupakan milikan pasif.

Diputuskan (menolak rayuan)
Oleh Suriyadi Halim Omar HMR menyampaikan penghakiman mahkamah:

(1) Adalah jelas bahawa tiada konklusi lain yang boleh dicapai oleh hakim bicara melainkan bahawa perayu mempunyai jagaan serta kawalan ke atas dadah. Perayu jelas mempunyai kuasa untuk melupuskan dadah sejak beliau keluar dari flat sehinggalah sejurus sebelum beliau diserkap oleh polis. Keadaan beliau yang ketakutan, percubaannya untuk melarikan diri serta pengguguran beg plastik olehnya menunjukkan tingkah laku yang boleh diterima-masuk di bawah s. 8 Akta Keterangan 1950 dan sekaligus memberi kesan terhadap fakta yang menjadi isu. Inferens yang boleh dicapai dari tingkah laku tersebut adalah bahawa perayu tahu apa yang dibawanya. Kelakuan sedemikian menunjukkan rasa bersalah perayu dalam ertikata beliau mempunyai pengetahuan tentang dadah. *PP v. Mohd Radzi Abu Bakar* (dirujuk); *PP v. Reza Mohd Shah Ahmad Shah* (dirujuk); *Abdullah Zawawi Yusof v. PP* (dirujuk); *Parlan Dadeh v. PP* (dirujuk).

(2) Dalam kes semasa, elemen-elemen kawalan fizikal serta pengetahuan telah dibuktikan dengan secara teliti. Dapatan oleh yang arif hakim adalah juga didasarkan kepada keterangan terus. Oleh itu tiada keperluan untuknya menggunakan apa-apa anggapan statutori bagi mencapai keputusan yang amat ketara itu. Sebarang percubaan untuk mengelak dari merujuk kepada

keterangan terus tidak membantu pihak pendakwaan, bilamana ia berhasrat untuk memakai mana-mana anggapan kemudiannya. *PP v. Mohd Radzi Abu Bakar* (dirujuk).

(3) Hakim bicara telah enggan menimbang keterangan terus berkaitan elemen pengedaran dan sebaliknya telah menggunapakai anggapan pengedaran di bawah s. 37(da)(vi) ADB. Tiada salahnya dengan jalur tindakan beliau ini. Hakim juga tidak khilaf dalam mendapati pendakwaan telah membuktikan suatu kes *prima facie* pengedaran. Di akhir kes pembelaan, hakim bicara dengan betulnya merumuskan bahawa perayu gagal menyangkal anggapan pengedaran serta kes pendakwaan atas imbangan kebarangkalian. Beliau tidak khilaf dalam memutuskan bahawa kes pendakwaan telah dibuktikan di luar keraguan munasabah.

(4) Persoalan memilih satu anggapan tetapi tidak yang lain tidak berbangkit dalam kes ini. Hakim bicara mempunyai keterangan terus yang mencukupi bagi memutuskan secara afirmatif bahawa ingredien milikan telah berjaya dibuktikan tanpa perlu menggunapakai s. 37(d) ADB. Dapatan afirmatif ini adalah konsisten dengan pandangan Mahkamah Persekutuan dalam *Muhammed Hassan v. PP* bahawa harus wujud suatu dapatan afirmatif secara terus, yang bukannya suatu anggapan undang-undang, sebelum boleh menggunapakai anggapan pengedaran. Selain itu, nampaknya tiada undang-undang sedia ada yang mengarahkan seorang hakim supaya memilih satu anggapan statutori dan tidak yang lain, sementelah yang memaksanya untuk menggunapakai suatu anggapan statutori pengedaran bilamana terdapat keterangan terus yang berlebihan di sisinya.

(5) Dalam kes semasa, ingredien "pembelian" yang dirangkum maksud pengedaran dengan mudah dapat dibuktikan melalui keterangan terus, sekaligus membuktikan lebih dari milikan pasif. Keterangan terus "pembelian" boleh dilihat dari pengakuan perayu dan kandungan percakapan beramarannya yang relevan, serta dadah berharga mahal yang ditemui padanya. Memandangkan perayu ditangkap ketika sedang melakukan kesalahan dengan jumlah dadah yang banyak, ditambah pula dengan pengakuan dan kelakuannya, beliau jelas terlibat dengan sesuatu yang lebih dari milikan pasif. Beliau sebenarnya mengedar dadah seperti yang dipertuduhkan. Atas keseluruhan keterangan yang dikemukakan, pendakwaan telah membuktikan kesalahan pengedaran di luar keraguan munasabah. *PP v. Haling Arala Jimjani* (dibezakan).

Case(s) referred to:
Abdullah Zawawi Yusof v. PP [1993] 4 CLJ 1 SC ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
Ong Ah Chuan v. Public Prosecutor [1981] 1 MLJ 64 ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP v. Abdul Manaf Muhamad Hassan [2006] 2 CLJ 129 FC ***(refd)***
PP v. Haling Arala Jimjani [2008] 4 CLJ 163 HC ***(dist)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Reza Mohd Shah Ahmad Shah [2009] 1 LNS 1194 ***(refd)***
Teh Geok Hock v. PP [1989] 2 CLJ 977; [1989] 1 CLJ (Rep) 160 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 12(2), 37A, 37(d), (da)(vi), 39B(1)(a)
Evidence Act 1950, s. 8

For the appellant - Teh Poh Teik; M/s Teh Poh Teik & Co
For the respondent - Suzana Atan; AG's Chambers

[Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45-29-2001]

Reported by Andrew Christopher Simon

JUDGMENT

Suriyadi Halim Omar JCA:

[1] The appellant was charged at the High Court for the offence of s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act) of trafficking 866.28 grams of cannabis. At the conclusion of the trial he was convicted and sentenced to death by the learned judge. He then filed the appeal and we heard the appeal. We dismissed the appeal and accordingly affirmed the conviction and sentence.

[2] The charge preferred against him reads as follows:

> bahawa kamu pada 17 Mac 2001, jam lebih kurang 9.30 malam, di tepi jalan berhampiran gerai makan, Kg. Kerinchi, Brickfields, Kuala Lumpur, Wilayah Persekutuan, telah mengedar dadah berbahaya, iaitu 866.28 gram cannabis dan oleh itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[3] The facts of this case are as follows. On 17 March 2001 at about 7pm SP5 (Haslah bte Bachok) received information pertaining to the activity of drugs trafficking. Acting on that information, she led a police party comprising nine police personnel to the scene, which was at Kg. Kerinchi, near some food stalls. They positioned themselves waiting for the target, with SP5 and SP6 observing from across the road close to the Vista Angkasa flats. At about 9.30pm, these two witnesses saw the appellant emerging from the Kg. Kerinchi flats, carrying a white plastic bag passing by food stalls, and then standing on the pavement. These two witnesses were only 12 to 15 feet away from him and had observed him for 1 to 2 minutes. The appellant was looking left and right as though looking for someone. SP5 testified that the appellant was always alone.

[4] The appellant unfolded his defence in the course of the cross-examination during the prosecution stage, which was the earliest stage, and was as follows. He had bought a burger at a mobile stall and was at the vicinity of the relevant spot for about five minutes. After paying for the burger he attempted to cross the road by the stairs; SP5 denied the existence of the supposed burger held by the appellant, or presence of a burger stall at the place of incident. At the stairs the appellant alleged that he was dragged by the police to the rear of the food stalls and at no stage did he let go of the plastic bag. His defence was further beefed up by D23 ie, the cautioned statement tendered by himself through SP7, as gleaned from p. 157 Vol.1 of the Record of Appeal. The appellant's intention to bring forth his defence, was immediately detected by the learned judge as he wrote, "Defence telah kemukakan pembelaan mereka melalui D23". The following excerpt is part of the cautioned statement, pursuant to s. 37A of the Act:

S. Adakah kamu dipaksa, diugut,dijanjikan atau didorong untuk memberikan percakapan kepada saya?

J. Tidak ada.

S. Adakah kamu akan memberikan percakapan secara sukarela?

J. Ya, sukarela.

S. Boleh kamu ceritakan kepada saya kenapa kamu di tangkap oleh polis?

J. Saya telah ditangkap oleh polis pada hari sabtu jam lebih kurang 10.00 malam 17.3.2001 kerana disyaki mengedar ganja. Polis ada rampas ganja satu ketul lebih kurang (1) kilo. Ganja tersebut kepunyaan "Boy" seorang lelaki cina. "Boy" hantar barang itu (ganja) kepada saya. Kerana saya beli daripadanya. Saya beli ganja tersebut daripada "Boy" dengan harga RM1300.00. Saya hubungi "Boy" untuk beli ganja tersebut dengan menggunakan handphone. Saya punya handphone 017-3842403 dan "Boy" 012-3219918. Saya telephone "Boy" hendak beli ganja dan "Boy" telah tinggalkan ganja tersebut didalam semak dihadapan kedai makan, Kg. Kerinchi, dimana tempat polis jumpa ganja tersebut. "Boy" telephone saya lebih kurang pukul 9.00 malam bagitahu dia telah letak ganja ditempat tersebut dan saya tidak terus ambil ganja tersebut.

Apabila saya kena tangkap dibelakang kedai makan Kg. Kerinci, pihak polis terus tanya saya mana saya simpan ganja. Saya tidak tahu daripada mana polis tahu berkenaan ganja tersebut. Polis geledah tempat tersebut dan telah jumpai dadah ganja yang telah diletakkan oleh "Boy". Polis rampas ganja tersebut dan tangkap saya.

S. Adakah kamu bercakap benar?

J. Ya, benar.

S. Adakah kamu hendak tambah atau ubah percakapan kamu?

J. Tidak ada.

"Percakapan dibacakan balik diakui benar dan betul".

T.T OKT.

[5] According to the prosecution, before the arrest the appellant was still carrying that white plastic bag, held in his right hand, as seen with him earlier. At the end of that '1 to 2 minutes', the appellant intended to descend the stairs and moved towards the main road. At this juncture SP5 and her team moved forward, whence about 5 feet from the appellant called out, "police". The appellant then dropped the white plastic bag on the road and attempted to flee. He was arrested after a scuffle and upon examining the white plastic bag, the police found a newspaper package in it. That newspaper package contained a compressed block of dried leaves, later confirmed as cannabis, which weighed 866.28 grams. At the conclusion of the hearing the court was satisfied that the compressed block of dried leaves were cannabis weighing 866.26 grams. In fact before this panel counsel for the appellant never challenged this conclusion.

[6] Returning to the evidence adduced by the prosecution, according to SP6 the appellant looked frightened. On him was retrieved a purse containing his identity card and cash totaling RM183 and a hand phone.

[7] Going by the cautioned statement, apart from the suggestion of buying a burger at a mobile stall at the vicinity, and at no stage dropping the plastic bag, the appellant proceeded to establish through D23 that the exhibits tendered by the police were recovered in the bushes. As per the cautioned statement when asked why he was arrested by the police he clarified that the drugs were owned by a person called "Boy". He admitted that "Boy" sent the drugs to him as he had bought it for RM1,300. He admitted using the handphone to contact "Boy". Pursuant to that call, "Boy" had left the drugs in the bushes in front of the food stalls, which drugs were recovered by the police. He stated in the statement too that "Boy" telephoned him at about 9pm informing him that he had left the drugs in the bushes. He also did not retrieve those drugs. He stated that the police had found the offending drugs and thereafter arrested him.

[8] There was a distinct difference between the story of the appellant and the prosecution in that the former had denied any nexus with the drugs physically found on him whilst the prosecution testified that he was caught red-handed with them. The prosecution had established that the drugs were never recovered from the bush. From their observation post, the police saw the appellant continuously in possession of the white plastic bag, which contained the drugs, from the moment he emerged from the Kg. Kerinchi flats until his arrest. These facts, up to the stage of his arrest with the incriminating drugs, had made short shrift of all his suggested defence in the course of cross-examining the prosecution's witnesses or that he had yet to receive the drugs bought from "Boy", as recorded in the cautioned statement.

[9] Based on the elicited facts, it was obvious from his finding of facts that there was no other conclusion the learned judge could arrive at except that the appellant had custody and control of the drugs. He certainly had the power of disposal over the drugs from the time he emerged from the Kg. Kerinchi flats, and minutes before he was pounced by the police (*PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457). If he had yet to retrieve the drugs from "Boy" why portray the frightened appearance, the act of attempting to flee, or dropping the white plastic bag? His reaction

is clearly admissible under s. 8 of the Evidence Act 1950 and has a bearing on the facts in issue as the drugs were found on him. The inference to be drawn from the above conduct is that he knew what he was carrying. In *PP v. Reza Mohd Shah Ahmad Shah* [2009] 1 LNS 1194 the act of running away from the police, and throwing away of the plastic bag, was utilizable as an indicator to show that he knew the nature and contents of the said bag to be dangerous drugs. The court there opined that proof of knowledge was a matter of inference, in particular conduct prior to his arrest. In the current appeal, for starters, he was arrested with the dangerous drugs, followed by his attempts to take to his heels, and about simultaneously dropping the plastic bag, with the obvious attempt to distance himself with the contents of that bag. Based on the above we concluded that these indicators, in particular his countenance and conduct, were clear indicators of guilty mind in that he had knowledge of the drugs (*Abdullah Zawawi Yusof v. PP* [1993] 4 CLJ 1; *Parlan Dadeh v. PP* [2009] 1 CLJ 717).

[10] From these incriminating set of facts, the learned judge was entitled to arrive at certain conclusions. With the drugs in the white plastic bag, and he physically and knowingly had carried it, compounded by his subsequent countenance and acts, how could the learned judge not be satisfied that the appellant had possession of the drugs? The element of physical control as well as the element of knowledge had been scrupulously proved (*PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457). His finding was founded on direct evidence and no necessity arose for him to invoke any statutory presumption to arrive at such an obvious conclusion. Obviously too, any attempt to avoid alluding to the available direct evidence would not hold the prosecution in good stead, when wishing to invoke any presumption provision later.

[11] The other relevant ingredient needed to be established by the prosecution was that the appellant was trafficking as per the charge. This ingredient could be established either by direct evidence or by invoking s. 37(da)(vi) of the Act. It was obvious that the learned judge had refused to consider direct evidence regarding this issue. The easy way was taken up by him, in that as the cannabis exceeded 200 grams, a presumption arose under s. 37(da)(vi) of the Act, and unless rebutted, he was presumed to be trafficking. There was nothing wrong in this course of action.

Combining the set of facts, which affirmatively established possession of the 866.28 grams of cannabis, together with the presumption of trafficking, the learned judge was satisfied that the prosecution had established a *prima facie* case of trafficking as per the charge. We found no error there too when the appellant's defence was called.

[12] At the close of the defence case, not only was the presumption of trafficking not rebutted, but from the totality of the evidence the learned judge, after meticulously sifting the evidence, had correctly concluded that the appellant had failed to rebut the prosecution's case on a balance of probability. He decided that the prosecution's case had been established beyond reasonable doubt, whereupon the appellant was found guilty of the charge of trafficking, as per the charge and sentenced to death.

What Made The Learned Judge Decide Against The Appellant?

[13] To appreciate the reasons why the learned judge decided against the appellant, a need arises to decipher the testimony of the appellant, which substantially begins at p. 182 of the appeal record. He testified that on that material time he was at a burger shop waiting for a friend called "Boy" whom he knew was a drug trafficker. He waited as he wanted to buy ganja from him and while waiting he bought a burger. Later "Boy" called up and said that the ganja ordered by him were in some bushes in front of a foodstall. He never retrieved the alleged drugs from the bushes. When going down the stairs he saw SP5 and SP6 walking towards him. SP5 then arrested him. In the scuffle he dropped the plastic bag which contained his burger. Later a policeman approached them bringing along a white plastic bag saying that the bag was retrieved from some bushes. The appellant denied being the owner of the plastic bag, which contained the very drugs alleged by the police to have seized from him.

[14] The learned judge had scrutinized both the evidence adduced by the prosecution and the appellant intensely, and after a maximum evaluation of SP5 and SP6's evidence, found their evidence credible. He had found them as truthful witnesses. In comparison to these witnesses the learned judge found the appellant's evidence wanting and questionable. As at p. 237 of the record of appeal the learned judge found conflicting stories having been adduced by the appellant. I reproduce the relevant portion of the grounds of judgment:

> Ertinya, OKT menyatakan bahawa dia tidak jadi beli ganja kerana yang ada ialah ganja berharga RM1,300. Dengan jawapan it saya dapati okt terperangkap lebih dalam lagi. Ini adalah kerana jawapan itu menimbulkan cerita baru yang tidak pernah timbul sebelum itu dalam keterangan okt dalam pemeriksaan utama. Yang lebih penting lagi ialah bahawa keterangan okt bahawa dia tidak beli ganja … bercanggah dengan D23.
>
> Saya dapati percanggahan tersebut adalah percanggahan yang material tentang perkara yang amat penting yang menjadi asas kepada pembelaan OKT. Dalam pengamatan saya percanggahan tersebut tidak akan berlaku jika okt telah bercakap benar. Saya memutuskan bahawa percanggahan tersebut meranapkan kebolehpercayaan keterangan OKT.

[15] It was based on the above reasons, amongst others, that the learned judge concluded that the appellant had failed to rebut the prosecution's case.

Approach Of The Appellant Before This Panel

[16] The appellant ventilated two grounds before us *viz*.:

i. the learned judge should have utilized the presumption on possession rather than on the ingredient of trafficking; and

ii. even if there was possession it was "passive possession" thus rebutting the presumption provided for in s. 37(da) of the Act.

[17] The appellant's counsel in the course of the appeal before us came out strongly with a novel submission that, when a judge wishes to invoke any statutory presumption, in order to establish an ingredient, especially when he has more than one choice, he must invoke one that benefits an accused person. In clarification, learned counsel submitted a hypothetical scenario where, due for want of direct evidence, say to establish the ingredient of possession or trafficking, a judge may allude to a certain statutory presumption for assistance. Admittedly with the law as it stands, in that there is a bar against double presumption that judge therefore has to ensure that only one statutory presumption be invoked, with the rest of the necessary ingredients being established by direct evidence (*Muhammed Hassan v. PP* [1998] 2 CLJ 170).

[18] In the context of this case, he ventilated that the presumption for possession should have been invoked, and not for the ingredient of trafficking. Having scrutinized the evidence, we held the view that his submission could not hold sway, as the question of choosing one over the other did not arise here. In relation to the ingredient of possession, the learned judge had sufficient direct evidence to decide affirmatively whether this ingredient had been established without the need of invoking s. 37(d) of the Act. This affirmative finding was in consonant with the view of the Federal Court in the above *Muhammed Hassan v. PP (supra)* that there must be an express affirmative finding of possession, as opposed to legal presumption, before giving rise to the presumption of trafficking. We are unaware of any law in existence that may direct a judge to choose a statutory presumption in preference of another, let alone force him to invoke a statutory presumption when direct evidence is in abundance. Acquiescing to learned counsel's suggestion for purposes of this appeal would be inappropriate in the circumstances of the case and perhaps too radical. We therefore reject this submission.

[19] We now touch on the second argument. In rebuttal of the ingredient of trafficking learned counsel for the appellant had canvassed that even if there was possession it was "passive possession" thus rebutting the ingredient of trafficking. In support of this ground learned counsel referred to *PP v. Haling Arala Jimjani* [2008] 4 CLJ 163. In this case, the respondent was charged for trafficking 193.76 grams of methamphetamine under s. 39B of the Act, but acquitted without the defence being called as there was only passive possession. He, on the other hand was found guilty of the offence under s. 12(2) of the Act. The Public prosecutor appealed but failed. The Court of Appeal similarly upheld the acquittal on the same ground as supplied by the presiding judge. Learned counsel for the current appeal had referred to the following excerpt found in the above case in support of its appeal:

> Adalah jelas daripada nasihat Privy Council dalam kes itu bahawa unsur-unsur pengedaran seperti terdapat dalam s. 2 ADB juga tidak boleh dibaca tanpa mengambilkira konsep dan rasional di sebalik unsur-unsur yang terdapat dalam seksyen itu. Ia harus dipertimbangkan dengan konsep adanya pembekal dan adanya penerima, yakni kewujudan dua pihak untuk mencapai maksud sebenar unsur-unsur tersebut. Tanpa ciri ini perbuatan membawa itu sahaja hanya boleh ditakrifkan sebagai satu milikan pasif oleh pembawanya.

[20] The effect of the above statement is that an extended meaning is given wherein mere carrying of drugs, even though above the presumption level, will not suffice to qualify as trafficking (*PP v. Abdul Manaf Muhamad Hassan* [2006] 2 CLJ 129; *Ong Ah Chuan v. Public Prosecutor* [1981] 1 MLJ 64). To qualify as trafficking, an overt act as promulgated by the Act has to take place, with a supplier and a recipient in place and there exist features that bring the alleged trafficking within the spirit of the Act. It was no surprise that the appellant alluded to this case, as he was not caught red-handed supplying a recipient of the drugs, thus saved by the want of the two parties prerequisite.

[21] The above view was opined by the Court of Appeal despite the wide definition of "trafficking", which includes all the doing words in s. 2 of the Act, let alone the Act permits presuming trafficking when the situation allows. The facts in *PP v. Haling Arala Jimjani (supra)* are easily distinguishable to that of the current appeal, in that in the latter case the court was satisfied that the respondent did not attempt to flee and there was great difficulty in establishing knowledge. Here not only did he attempt to flee but also dropped the bag. The issue of knowledge was never a problem with the learned judge.

[22] In the current appeal, the ingredient of buying, which falls within the terminology of trafficking could easily have been established by direct evidence, hence establishing more than passive possession. The direct evidence of buying could be gauged from the admissions of the appellant and relevant contents of the cautioned statement, coupled with the costly drugs having being found on him. How else could he have possession of those drugs, unless the transaction with "Boy" was already complete in that he had already paid for them and the drugs forthwith handed to him? By that deduction he naturally would have knowledge of the drugs. The fact that the drugs, which he discussed with Boy would cost him RM1,300 (with the drugs indeed were recovered from him), and the sum of money recovered from him was a mere RM183, strengthened our view that the transaction must have already taken place.

[23] This act of buying would fall squarely within the provision of trafficking, as defined in s. 2 of the Act. It reads:

A "trafficking" includes the doing of any of the following acts that is to say manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug.

B **[24]** Of the ingredient of buying Hashim Yeop Sani CJM in *Teh Geok Hock v. PP* [1989] 2 CLJ 977; [1989] 1 CLJ (Rep) 160 had occasion to remark:

> The definition of 'trafficking' in the Act is wide and includes not
C only **buying** and selling, but also carrying, concealing and keeping. It is totally different from the definition of the word 'traffic' in the Singapore Misuse of Drug Act. In the Singapore provision to 'traffic' in a controlled drug so as to constitute and offence of trafficking involves something more then passive possession or self-administration of the drug (emphasis supplied).

D **[25]** It was our view that, since he was caught red-handed with a large amount of drugs, exacerbated further by his countenance and conduct, he was involved with something more than passive possession. Indeed he was trafficking as per the charge. Come the
E defence stage the appellant's story was still that of mere denial, be it on the issue of the drugs found on him, his conduct or his attempts to distance himself with the plastic bag that contained the drugs. There was no attempt to rebut the presumption of trafficking except doggedly sticking to his initial story of never
F physically holding the drugs. On the totality of the evidence adduced, we were satisfied beyond reasonable doubt that the prosecution had proven the offence of trafficking, when the appellant was caught in possession of 866.28 grams of cannabis on 17 March 2001 at about 9.30pm. The learned judge therefore
G had made no error when concluding that the appellant had not rebutted the prosecution's case at the end of the defence case. Based on the above reasons we dismissed the appeal and accordingly affirmed the conviction and sentence of the High Court.

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